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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 DONALD GRAHAM,

4 Plaintiff,

5 v.

15 CV 10160 (SHS)

6 RICHARD PRINCE, *et al*,

7 Defendants.

8 -----x

9 ERIC McNATT,

10 Plaintiff,

11 v.

16 CV 8896 (SHS)

12 RICHARD PRINCE, *et al*,

13 Defendants.

DECISION

14 -----x

15 New York, N.Y.
16 September 19, 2019
3:06 p.m.

17 Before:

18 HON. SIDNEY H. STEIN,

19 District Judge

20 APPEARANCES

21 CRAVATH SWAINE & MOORE
Attorneys for Plaintiffs

22 BY: CAITLIN N. FITZPATRICK

23 GREENBERG TRAURIG
Attorneys for Defendant Richard Prince

24 BY: IAN C. BALLON

ALENA M. MARKLEY

25 NINA D. BOYAJIAN (appearing telephonically)

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APPEARANCES (continued)

DONTZIN NAGY & FLEISSIG

Attorneys for Defendants Gagosian Gallery, Inc.

and Lawrence Gagosian

BY: TRACY O. APPLETON

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(Case called)

MS. FITZPATRICK: Caitlin Fitzpatrick, on behalf of
plaintiffs, from Cravath, Swaine & Moore.

THE COURT: Good afternoon.

We have somebody on the phone, so please speak loudly.

MR. BALLON: Good afternoon, your Honor.

Ian Ballon of Greenberg Traurig, for defendants
Richard Prince and the two Blum & Poe entities.

THE COURT: Good afternoon.

MR. BALLON: Good afternoon.

MS. BOYAJIAN: Good afternoon, your Honor.

This is Nina Boyajian from Greenberg Traurig
representing Richard Prince in both matters, and Blum & Poe &
McCann.

THE COURT: Good afternoon.

MS. MARKLEY: Good afternoon. Alena Markley.

I'm also with Greenberg Traurig, representing Blum &
Poe and Richard Prince.

MS. APPLETON: Good afternoon, your Honor.

Tracy Appleton, from Dontzin, Nagy & Fleissig, on
behalf of Gagosian Gallery, Inc. and Lawrence Gagosian.

THE COURT: Good afternoon to all of you.

Please be seated in the courtroom.

I was seriously considering bringing you in for oral
argument on the expert motions. I'm not going to have argument

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1 now on the summary judgment motions; that will come later. At
2 another time I'll bring you in for oral argument on that. And
3 I do need oral argument on the summary judgment motions.

4 But I realized, after considering it, the motions to
5 strike the expert reports are very straightforward, and really
6 I feel quite comfortable in reaching a decision without oral
7 argument on it.

8 I'm not quite sure why the motions were made. It's
9 quite clear the experts are being used in conjunction with the
10 motions for summary judgment. So it's a decision for me to
11 make and for me to credit or not credit, whatever it is to be
12 credited or not credited in these affidavits, and to put those
13 parts of the affidavits' expert reports that I accept, to
14 weight them accordingly.

15 I'm not going to parse every expert report line by
16 line; the cases are clear I don't have to, and I'm not going
17 to, it would be a waste of time. I'm not going to accept legal
18 conclusions.

19 You have somebody here, I think it's -- is it
20 Ms. Besek? I think so. She's functioning as a lawyer. I
21 don't need her to tell me about the law. Presumably I'll reach
22 my own conclusions on what the law is and the lawyers will tell
23 me what the law is. So I'm going to strike her entire report.

24 Other than that, I'll credit what I deem to be
25 appropriate and disregard what is inadmissible.

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1 That's the overview. But I'll give you more specifics
2 at this point.

3 The experts, all of the experts, are fair use experts,
4 with the exception of a single damage expert. From the
5 standpoint of the damage experts, I'm going to -- expert, I'm
6 going to -- that's Stephen Holzen -- I'm going to deny that
7 without prejudice. So if the result of the summary judgment
8 motions is that we go on to damages, I'll then consider that.
9 But I don't have to rule on the admissibility of the Holzen
10 damage report at this point. Actually, a better way to do it
11 is to dismiss it without prejudice; not to deny it, I'll
12 dismiss it without prejudice.

13 I'm not going to go into the background and the facts,
14 because the parties know that. And the parties understand Rule
15 702 as well. I don't have to set all of that forth.

16 The legal standards are as follows:

17 "Under *Daubert*, the district court functions as the
18 gatekeeper for expert testimony, whether proffered at trial or
19 in connection with a motion for summary judgment." *Buckley v.*
20 *Deloitte & Touche USA LLP*, 888 F. Supp. 2d 404, 412 (S.D.N.Y.
21 2012), *aff'd*, 541 F. App'x 62 (2d Cir. 2013) (quoting *Major*
22 *League Baseball Props., Inc. v. Salvino*, 542 F.3d 290, 310 (2d
23 Cir. 2008)) "Expert opinions that are without factual basis
24 and are based on speculation or conjecture are inappropriate
25 material for consideration on a motion for summary judgment."

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1 That's a citation again from Buckley and again quoting *Major*
2 *League Baseball Properties*. And the same is true of conclusory
3 opinions; same citation.

4 "When a party offers expert declarations in support of
5 its position, and a motion has been made to exclude such
6 expert, a court must decide that motion first, in order to
7 determine whether such testimony may be considered in
8 connection with summary judgment." *In re Puda Coal Sec. Inc.,*
9 *Litig.*, 30 F. Supp. 3d 230, 253 (S.D.N.Y. 2014), affirmed, 649
10 F. App'x 55 (2d Cir. 2016), under the name of *Querub v. Hong*
11 *Kong*.

12 "Evidence inadmissible at trial is insufficient to
13 create a genuine dispute of material fact, and the Court need
14 not engage in a separate line-by-line analysis of [the
15 parties'] objections." *Hitachi Data Sys. Credit Corp. v.*
16 *Precision Discovery, Inc.*, 2019 WL 3802178, at *3 (S.D.N.Y.
17 Aug. 13, 2019).

18 I may deny motions as a formal matter, and I have
19 discretion to simply disregard inadmissible portions of
20 evidence at summary judgment. That's also from my opinion in
21 *Hitachi*. See also *Amnesty Am. v. Town of W. Hartford*, 361 F.3d
22 113, 132 n.12 (2d Cir. 2004). And see *In re NewStarcom*
23 *Holdings, Inc.*, 547 B.R. 106, 138 (Bankr. D. Del. 2016).

24 Again, I'm not going to set forth Rule of Evidence
25 702; you know what it is.

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1 And here, the proposed expert testimony is not of a
2 technical nature, but, rather, falls within the ambit of social
3 science. And I'm guided by the objectives of the *Daubert*
4 factors, and I can't really apply each of the factors
5 mechanically because there are no formulas here or reproducible
6 experiments. See *United States v. Paracha*, 2006 WL 12768, at
7 *19, aff'd, 313 F. App'x 347 (2d Cir. 2008) (citing *Kumho Tire*
8 *Co. v. Carmichael*, 526 U.S. 137, 152 (1999)).

9 All right. Let's turn first to the motions to exclude
10 the fair use experts.

11 For the motions for summary judgment, I obviously have
12 to determine whether there is a genuine dispute of material
13 fact. And in order to assist my determination of whether there
14 is a material issue -- an issue of material fact, I can look to
15 areas of these reports that give their views in terms of fair
16 use; I can credit certain portions of the report, and I can
17 disregard those portions that, for example, just give a legal
18 conclusion or are inadmissible in some other way.

19 I've already said that the legal expert report I'm
20 going to exclude.

21 "It is a well-established rule in the Second Circuit
22 that experts are not permitted to present testimony in the form
23 of legal conclusions." *United States v. Articles of Banned*
24 *Hazardous Substances Consisting of an Undetermined No. of Cans*
25 *of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994) (citing

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1 *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir.1992)). I'm going to
2 disregard the legal conclusions; I'm going to apply the law as
3 it exists; and I'm not going to substitute any expert's legal
4 conclusion for my own. See *Hewitt v. Metro-N. Commuter R.R.*,
5 244 F. Supp. 3d 379, 393 (S.D.N.Y. 2017)

6 I'll also disregard the experts' comparison of the
7 works to the extent they encroach on the jury's role to
8 visually compare the works. The jury can compare the works;
9 they don't need an expert to compare the works.

10 On the motions for summary judgment in this case, I
11 sit in the position of having to compare the works simply to
12 determine whether there is a genuine dispute of material fact.

13 In ruling on the motion to dismiss, I directed that
14 there be evidence produced on whether Prince's works are
15 transformative. When I was going through the cases and in my
16 opinion, I saw that the cases do use art criticism. And so the
17 art criticism experts are generally allowable. See my opinion
18 in *Graham*, 265 F. Supp. 3d at 382.

19 To the extent that the opinions are helpful, I will
20 accept them; and to the extent that they usurp my role, I will
21 disregard them. It is the June Besek report that I am
22 excluding entirely. All of her opinions essentially are legal
23 conclusions. There is a single reference opinion in her report
24 saying that the works are not not transformative basically
25 because they are in the frame of the Instagram interface. But

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1 she is not an expert on Instagram. She's a lawyer; she is
2 knowledgeable about copyright law, not art. So, as I said, I
3 am not going to include or consider her views on copyright law.

4 I will, you'll see, consider the views on the law of
5 the Jamaican person, because that falls with a Jamaican expert
6 from Jamaica is the way to put that; she's Queens counsel.
7 Because that's under a separate rule in the Federal Rules of
8 Evidence allowing affidavits in terms of foreign law. But not
9 Besek. So the Besek report is stricken entirely.

10 It's Ms. Minott-Phillips QC who is the Jamaican
11 attorney. And her testimony is admissible for me to consider
12 on the motions for summary judgment. That's Rule 44.1.

13 Now we'll take a look at the general objections from
14 defendants.

15 They say that plaintiffs' experts' opinions on the
16 transformativeness or lack of transformativeness is based on
17 insufficient facts and data because they never inspected the
18 large-scale works in person, and they simply inspected copies
19 of the works. That goes to the weight, not the admissibility,
20 of these opinions. See *Cedar Petrochemicals, Inc. v. Dongbu*
21 *Hannong Chem. Co.*, 769 F. Supp. 2d 269, 285 (S.D.N.Y. 2011).

22 Defendants also argue that Whitaker, Bogre, and
23 Coleman are either unqualified or have insufficient factual
24 bases to opine on the effect of Prince's works on the market
25 for Graham's works.

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1 Whitaker is qualified to testify on the art market
2 based on her education, including an MBA and a degree in fine
3 art, as well as her experience teaching business as it relates
4 to the arts. See *In re LIBOR-Based Fin. Instruments Antitrust*
5 *Litig.*, 299 F. Supp. 3d 430, 466 (S.D.N.Y. 2018) quoting *Cary*
6 *Oil Co. v. MG Ref. & Mktg., Inc.*, 2003 WL 1878246, at *2
7 (S.D.N.Y. Apr. 11, 2003)).

8 Bogre is not an expert on art market valuations; and
9 she, in fact, said that at her deposition. (See Bogre
10 Deposition, page 391). Accordingly, I'll disregard that
11 opinion of hers, but I need not disregard her entire report.
12 That's *In re LIBOR* again at 467 ("[A]n expert's lack of
13 qualifications as to some of the opinions offered does not
14 render inadmissible the opinions that he is qualified to
15 offer.").

16 With respect to the factual bases underlying the
17 opinions on the art market, whether there is a sufficient
18 factual basis underlying those opinions goes to the weight, not
19 the admissibility. See *Cedar Petrochemicals*, 769 F. Supp. 2d
20 at 285.

21 There are no empirical studies here, there are no
22 consumer surveys; so everything that's there goes to the
23 weight.

24 To the extent there are instances in which the experts
25 proffer only *ipse dixit* opinions, I'm going to disregard those

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1 opinions. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146
2 (1997).

3 Now let's turn to the objections from the plaintiffs.

4 The plaintiffs say that the defendants' people
5 shouldn't be allowed to speculate about Prince's state of mind
6 when he was working on the art, pointing to various portions of
7 the defendants' experts' reports, setting forth what meaning
8 Prince intended to convey in his works. As a general matter,
9 expert testimony as to a party's state of mind is inadmissible.
10 See *In re Rezulin Prod. Liab. Litig.*, 309 F. Supp. 2d 531, 546
11 (S.D.N.Y. 2004).

12 However, in the art context, divining the artist's
13 intent is what these art people do; they say the artist
14 intended to project intense devotion to a particular thing or
15 intended for the color to make this kind of statement. And, of
16 course, none of them actually know what the artist was
17 intending. But that type of testimony is allowed in these
18 cases. How critics interpret Prince's work is relevant to fair
19 use. And that's even separate from what his actual intent is.
20 See *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of*
21 *Am. Sec., LLC*, 691 F. Supp. 2d 448, 467 (S.D.N.Y. 2010). The
22 amount I credit that speculation or don't credit it goes to the
23 weight of the evidence, not its admissibility.

24 You see that's a theme obviously in this decision.

25 And similarly, I am able to read both sides' experts'

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1 recounting of the history of appropriation art and Prince's
2 substantial role in it, and evaluate that to the extent
3 helpful. Dr. Marwick's extensive recitation of the history of
4 the internet and social media is an example here.

5 Because of the involvement of the Instagram interface,
6 some of Dr. Marwick's testimony presumably will be useful to me
7 to elucidate any relevant concepts. But as the plaintiff
8 points out, part of her report concerning ARPA is irrelevant to
9 my fair use determination and I'll utilize the report
10 accordingly. See *In re LIBOR*, 299 F. Supp. 3d at 469 ("The
11 fact that some of an expert's opinions are irrelevant does not
12 render all of the expert's opinions inadmissible. Nonetheless,
13 we need not overly fragment an expert's opinions in order to
14 pick out only the relevant and helpful portions."). That's
15 from *In re LIBOR*.

16 Now, defendants' Objections to specific plaintiffs'
17 experts.

18 Defendants object to Ms. Whitaker's report, saying
19 that her "report reads like a protest article on art politics
20 rather than proper rebuttal testimony." Indeed part of that is
21 valid. I enjoyed her expert opinion that -- let me just make
22 sure I have the quote right. Paragraph 21. "Defendants'
23 experts' assessment of the plaintiff's works as 'not art'
24 depends upon the notion that art and artist are categories and
25 terms defined and controlled by experts or other elite voices

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1 in the art world. This notion is, at best, accidentally
2 undemocratic and, at worst, persistently and inexcusably
3 colonialist and in need of updating."

4 I was taken by such a statement. I haven't heard one
5 like that since the 1960s. I am going to disregard the
6 hyperbole in her opinion. See *Schwab v. Philip Morris USA,*
7 *Inc.*, 449 F. Supp. 2d 992, 1221 (E.D.N.Y. 2006), reversed under
8 the name on other grounds of *McLaughlin v. Am. Tobacco Co.*, 522
9 F.3d 215 (2d Cir. 2008). And I'll take the same approach for
10 all the expert reports.

11 With respect to plaintiff's expert Ms. Sussman,
12 defendants contest her qualifications and say she has no
13 recognized expertise in photography or appropriation art. I
14 think that's wrong; she does have relevant experience in art
15 curation and consulting, as she was a curator for a number of
16 hospitals and similar organizations. Her lack of expertise in
17 one field, but relevant experience in a related field, again,
18 goes to weight, not admissibility. See *Scentsational Techs,*
19 *LLC v. Pepsi, Inc.*, 2018 WL 1889763, at *2, affirmed under the
20 name *ScentSational Techs. LLC v. PepsiCo, Inc.*, 773 F. App'x
21 607 (Fed. Cir. 2019). See also *In re Rezulin*, 309 F. Supp. 2d
22 531, 559 (S.D.N.Y. 2004) ("A lack of formal training does not
23 necessarily disqualify an expert from testifying if he or she
24 has equivalent relevant practical experience").

25 I've already told you that I am going to dismiss

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1 without prejudice the report of plaintiffs' damages expert,
2 Stephen Holzen, and we'll deal with it if need be. All right?

3 I'm dismissing without prejudice Holzen. I am
4 striking Besek. And the others I will accept what parts I
5 should and reject what parts I should.

6 Thank you. I'll bring you in in a few weeks for
7 argument on the substantive summary judgment motions.

8 Thank you, all.

9 * * *